OMB 78-2564

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

August 2, 1978

LEGISLATIVE REFERRAL MEMORANDUM

TO: Legislative Liaison Officer
Department of Commerce
General Services Administration
Department of Health, Education and Welfare
Federal Trade Commission
Department of Justice
Department of State
Central Intelligence Agency
National Security Council
International Communications Agency
Office of Science and Technology Policy

SUBJECT: Draft DOD report on H.R. 13015, re communication reform.

The Office of Management and Budget requests the views of your agency on the above subject before advising on its relationship to the program of the President, in accordance with OMB Circular A-19.

A response to this request for your views is needed no later than cob, Friday, August 18, 1978.

Questions should be referred to Janet Fox (395-3802) ~~or to~~ ( ), the legislative analyst in this office.

Bernard H. Martin for
Assistant Director for
Legislative Reference

Enclosures
cc: Mr. Neustadt
Mr. Jeanneret
Mr. Haase
Mr. Sitrin
Mr. Hill
Mr. Messner
Mr. Cohen

DEPARTMENT OF DEFENSE
OFFICE OF GENERAL COUNSEL
WASHINGTON, D. C. 20301

1 August 1978

Honorable James T. McIntyre, Jr.
Director, Office of Management
and Budget
Washington, D. C. 20503

Dear Mr. McIntyre:

The views of the Department of Defense have been requested on H. R. 13015, 95th Congress, the "Communications Act of 1978."

Advice is requested as to whether there is objection to the presentation of the attached report to the Committee.

Sincerely,

Werner Windus
Director
Legislative Reference Service

Enclosure

GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE
WASHINGTON, D. C. 20301

Honorable Harley O. Staggers
Chairman, Committee on Interstate
and Foreign Commerce
House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

Reference is made to your request for the views of the Department of Defense on H.R. 13015, 95th Congress, a bill cited as the "Communications Act of 1978."

The Department of Defense opposes H.R. 13015 in its present form. The comments below, setting forth our objections, focus on—

(1) the bill's impact on this Department's national security telecommunications responsibilities and the broader emergency preparedness responsibilities of the Secretary of Defense as Executive Agent for the National Communications System;

(2) the bill's effect on Department of Defense interests as a major consumer of communications services; and

(3) important provisions of existing communications law that are treated inadequately or omitted from H.R. 13015.

Detailed Comments on H.R. 13015

Title I, Section 101.

This provision, and similar references in sections 331(2) and 334(b), state a congressional finding that regulation of interstate and foreign telecommunications is necessary only "to the extent marketplace forces are deficient" in providing diverse, reliable and efficient telecommunications services that are available at "affordable rates" and that "advance United States foreign policy, the national defense, and the safety of life and property".

While the current statutory goal of regulation to make available rapid, efficient communication service with adequate facilities at reasonable charges with the additional purposes of national defense and promoting safety of life and property (47 U.S.C. §151 (1970)) together with the current statutory standards of just and reasonable rates (47 U.S.C. §201-202) may not be models of clarity it appears that terms, such as "affordable" and "advance" in the Act will add more ambiguity and less clarity to the regulatory process. Not only are such terms subject to different interpretations but what is "affordable" to one consumer may well not be "afforded" by another. There are divergent views among the regulated carriers and the regulators as to what regulatory action constitutes an "advance" in U.S. foreign policy or the national defense.

The proposed basic premise of the Act of regulation only "to the extent marketplace forces are deficient" also seems inconsistent with the goals a competitive marketplace seeks to achieve. The interaction of "marketplace forces" is primarily designed to provide an optimally efficient economic allocation of resources and not to result in either "affordable" rates or "advances" in foreign policy or national defense. The reliance on "marketplace forces" to achieve "affordable" rates and "advance" the national defense and foreign policy does not appear to be justified.

Title III, Section 312(c).

This provision eliminates the "just and reasonable" rate standards of the Communications Act of 1937 (47 U.S.C. §201 (1970)) and substitutes a requirement that all rates and terms shall be "equitable". All rates for competitive services are also "presumed" to be equitable.

The term "equitable" again appears more vague than the current standard and clearly is subject to varying interpretations. The status of the presumption (i.e., conclusive or rebuttable) is also unclear.

Competition is not the panacea this provision assumes. The Department of Defense, for example, currently procures international communications through "competitive" bids from the several "competing" international record carriers. Although the Department of Defense has achieved some success in reducing rates thereby, these carriers' bids to the Department of Defense are so frequently identical that the majority of the Department of Defense's "competitive" awards for international service are made through an apportionment system established to effectively contract for service on a rotating basis among the carriers. This is occurring during a time when several proceedings are ongoing before the Federal Communications Commission to determine the lawfulness of the carriers' "competitive rates".

Recognizing that regulatory lag is sometimes a problem for smaller carriers, little harm is inflicted upon telecommunications common carriers through the Commission's exercise of its 5 month suspension power. It appears inconsistent now to place upon the consumer the entire burden of the inherent delay involved in regulation because of the magnitude and scope of most common carrier proceedings wherein several thousand pages of supporting documents are often filed by carriers to bear their "burden of proof" and several weeks of hearings are required for competing carriers, customers, and the Commission staff to sift such information for relevant material. The Act's arbitrary creation of a 9 month time limit, after which any rate is automatically lawful, is also unwarranted and appears to be an invitation for hurried Commission decisions based on inadequate records that will result in judicial review and further delay and uncertainty.

Past experience with the Federal Communications Commission indicates a definite inadequacy in the current law because of inordinate delays of several years in reaching regulatory decisions. It is desirable that specific time limitations be placed upon the Commission that require definitive action. Short periods will cause further delays, however, because they may generate inadequate records that will result in judicial review. Requiring completion of hearings within 12 months after designation with another 3-4 months for Commission decision would appear much more reasonable. Because of these specific time limitations for Commission action it is also necessary that the Commission retain some suspension powers to protect the consumer.

As our previous comments indicate any presumption that rates for competitive service are equitable and lawful is unjustified. The Act should contain, therefore, provisions permitting refunds for unlawful and inequitable rates for competitive service.

Title III, Sections 332-333.

Section 332 permits any common carrier to acquire another company which provides a service or offers a product determined by the Commission to be telecommunications or incidental to telecommunications. Section 333 then requires any carrier providing a noncompetitive service to divest any subsidiary engaged in the manufacture of equipment used in furnishing any common carrier service.

Section 333 would have significant adverse impact on emergency preparedness and the Department of Defense's specialized services. A carrier's capability to manufacture equipment through a subsidiary

that can then be used in furnishing common carrier service is a significant resource capability that is useful in improving responsiveness in emergency or reconstitution situations. The integration of the functions of basic research, development, design, manufacture and standardization of operation and installation are valuable assets should the Nation's telecommunications ever need to be reconstituted. In many other instances, the Department of Defense also would have increased risks in getting common carriers to meet service dates for highly specialized services and equipment because the carriers would not be able to deal directly with a subsidiary manufacturer.

Divestiture might well increase the overall rates on American Telephone and Telegraph, General Telephone and Electronics and other vertically-integrated common carrier services because both the equipment manufacturer and the carrier will be seeking to maximize profits and the carrier will have less incentive to insure purchase of lowest-cost equipment. It is likely that the reliability that can be built into a subsidiary manufacturing facility's products for the parent company without excessive cost conservation objectives would be degraded in a cost competitive environment.

Title III, Sections 335-336.

Section 335 eliminates the current requirement for Federal Communications Commission authorization of domestic facilities construction (47 U.S.C. §214). Section 336(b) requires Commission authorization for discontinuance of service only for common carriers providing noncompetitive services.

It appears inconsistent to allow a common carrier to construct both competitive and noncompetitive facilities without Commission authorization and then to require Commission approval for the discontinuance of only noncompetitive services. The Department of Defense purchases much "competitive" service of national defense significance that involves service to lower density, less populated areas. These services are often of lower profit and higher cost to common carriers and to permit carrier discontinuance of such services without Federal Communications Commission approval might have significant adverse effect upon the Department of Defense.

Title III, Section 362(b)(2).

This provision permits Comsat to interconnect its satellite terminal stations with the facilities and services of domestic service carriers and international service carriers for provision of all services and, for purposes of maritime telecommunications services, with the facilities

of private telecommunications systems.

Section 352(8) defines "private telecommunications system" as "a network utilized for the transmission of telecommunications signals by a person who is not a common carrier".

It is not clear in reading section 362(b)(2) whether the intent is to restrict the right of Comsat to interconnect with or sell services directly to a "Government agency" as defined in section 103(11) of the Act. In view of the Committee's stated intent to repeal the Authorized User decision, which currently restricts government access to Comsat (see Press Release, June 7, 1978, p. 3), section 362(b)(2) should be clarified to permit unrestricted government agency access to Comsat.

Title III, Section 362(c)(2).

This section is overly restrictive in the use of maritime satellite land-terminal stations in that it limits use at a station owned by a government agency exclusively to training or experimentation. The ownership of such a station by the Department of Defense would most likely be for the purpose of using the station to support an operational mission. Therefore, an exception should be made that would allow ownership by the Department of Defense for operational use.

Title IV, Section 456.

This section states that ship transmitter powers may be increased without limit for distress communications. This should be changed to the extent that it should not be applicable exclusively to ships in distress. An aircraft in a distress situation should be allowed the same flexibility and be given the same level of service as a ship in distress.

Title IV, Section 457(a)(1).

Since this section exempts radio stations owned and operated by the Federal government from the provisions of sections 411 and 412 that pertain to licensing requirements and the powers of the Commission with regard to broadcasting stations, the exemption should logically apply to section 413 that pertains to the license fee. However, to avoid any conflicts of interpretation, and for consistency of responsibilities, government stations should be exempted specifically from the provisions of section 413.

Title IV, section 457(a)(3)

This section specifies that the Federal Communications Commission will designate call letters for all stations except mobile stations of the U.S. Army. Call letters used by the military departments often are generated as a need of tactical or strategic defense elements, and many times in accordance with international military agreements. These instances are not limited to mobile U.S. Army stations. The Department of Defense should be exempted from the requirement of having call letters designated by the Federal Communications Commission.

Title V, Section 534.

This provision continues the two-year statute of limitations presently contained in 47 U.S.C. §415. In a proceeding initiated by the Department of Defense and pending before the Federal Communications Commission, and in past Federal Communications Commission decisions, it has been held by the Federal Communications Commission that 47 U.S.C. §415 is not applicable to actions brought by the government. The Federal Communications Commission did find, however, in the pending case that the six-year statute of limitations in 28 U.S.C. §2415(a) is applicable. Although the latest Federal Communications Commission ruling was interlocutory and therefore not reviewable by a court at this time, it is our opinion that neither 47 U.S.C. §415 nor 28 U.S.C. §2415(a) is applicable to actions brought under the Communications Act of 1934 by the Department of Defense. We have also been advised in a memorandum dated October 28, 1977, that the Department of Justice concurs in our opinion on this matter and will seek judicial review on our behalf at the appropriate time.

Section 534 should be amended to reflect that it is not applicable to actions brought by the government or the legislative history of the Act should reflect a congressional intent to not alter past Federal Communications Commission rulings on this issue.

Title VII, Section 704

Title VII establishes an independent agency in the executive branch to be called the National Telecommunications Agency. Among the functions assigned to the National Telecommunications Agency (subsection (6)) would be the development of "plans, policies and programs for telecommunications facilities, services and systems for Government agencies;". Establishing an independent agency that could make planning and programatic decisions regarding telecommunications systems within such agencies as the Department of Defense, the Central Intelligence Agency,

National Aeronautics and Space Administration, and Federal Aviation Administration is incompatible with the statutory charters that established those agencies, and is a completely unacceptable concept.

Section 704(7) authorizes the National Telecommunications Agency to "communicate the views of Government agencies with respect to telecommunications matters to the Commission". In this regard 40 U.S.C. §481 authorizes the Administrator of General Services or the Secretary of Defense to represent the interests of agencies in proceedings involving common carriers or public utilities before Federal and state regulatory bodies, (e.g., Federal Communications Commission). The Administrator routinely delegates this responsibility to the Department of Defense. The effect of section 704(7) on 40 U.S.C. §481 is not clear. If no impact is intended, it should be clarified and the legislative history of the 1978 Act should indicate that section 711(b)(1) prevents the Act from altering the provisions of 40 U.S.C. §481.

Sections 704(9) and (10) like section 704(6), are unacceptable to the Department of Defense because they inject an independent agency in the development of national security and emergency preparedness mission type services that are the responsibilities of Executive Departments and agencies.

Section 606, Communications Act of 1934.

H.R. 13015 does not include the war powers provisions appearing in section 606 of title 47 U.S.C.. The omission of this provision would prevent the implementation of many telecommunications wartime emergency management plans and the wartime restoration priority system. Emergency preparedness needs make incorporation of section 606 language in H.R. 13015 essential.

Section 201(c)(5), Communications Satellite Act of 1962.

The Act repeals in section 804(b) the Communications Satellite Act of 1962, as amended, (47 U.S.C. Chapter 6 (1970)). Section 201(c)(5) of the Communications Satellite Act of 1962 reflected a congressional intent that the Federal Communications Commission "insure that any economies made possible by a communications satellite system are appropriately reflected in rates for public communications services" (47 U.S.C. §721(c)(5)). The Act contains no similar affirmation of congressional intent. In view of the nearly 10 year dispute involving

the Federal Communications Commission, Comsat, the Department of Defense and others over Comsat's rates for international satellite communications services (Federal Communications Commission Docket No. 16070) and the current dispute between the Federal Communications Commission, international record carriers, the Department of Defense, and others as to whether the nearly 48.5% Comsat rate reductions should accrue to the record carriers or to ultimate consumers such as the Department of Defense, the Act should reaffirm explicitly the congressional intent that public users are to benefit from the economies of the communications satellite system.

The Office of Management and Budget advises that, from the standpoint of the Administration's program, there is no objection to the presentation of this report for the consideration of the Committee.

Sincerely,

Deanne C. Siemer